

FEDERAL MAGISTRATES COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 608

MIGRATION – Application for judicial review of decision of Migration Review Tribunal – jurisdictional error alleged – none found – application dismissed.

Migration Act 1958, s.359A

Migration Regulations 1994, reg.1.15A

Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005]
FCA 464

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323

Kamal v Minister for Immigration and Multicultural Affairs (2002) 126 FCR 467

Re Minister for Immigration & Multicultural Affairs; Ex Parte Cohen [2001]
HCA 10

Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004]
FCA 686

Zhang v Minister for Immigration & Multicultural & Indigenous Affairs [2005]
FCAFC 30

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR
259

VAT v Minister for Immigration & Multicultural & Indigenous Affairs [2004]
FCAFC 255

Applicant:	THI LY HANG NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	MLG 1229 of 2006
Judgment of:	Burchardt FM
Hearing date:	22 March 2007
Date of last submission:	22 March 2007
Delivered at:	Melbourne
Delivered on:	26 April 2007

REPRESENTATION

Counsel for the Applicant: Mr W.G. Gilbert

Solicitors for the Applicant: FCG Legal Pty Ltd

Counsel for the Respondents: Ms K.L. Walker

Solicitors for the Respondents: Clayton Utz Lawyers

ORDERS

- (1) The name of the First Respondent be changed to 'Minister for Immigration & Citizenship'.
- (2) The application be dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1229 of 2006

THI LY HANG NGUYEN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. By application filed on 29 September 2006 the Applicant seeks judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) given on 24 August 2006 by which the Tribunal affirmed an earlier decision of a delegate of the First Respondent not to grant the Applicant a partner (migrant)(class BC) visa. The factual background to this matter is not itself controversial. What follows is taken from paragraphs 2-6 of the contentions of fact and law of the Applicant, and paragraphs 4-12 of the contentions of fact and law of the Respondents.
2. The Applicant is a national of Vietnam who married Mr Thanh Tung Tran, an Australian citizen, in a ceremony conducted in Vietnam on 26 January 2003. The parties had previously met at a family gathering as Mr Tran's sister is married to the Applicant's brother.

3. On 4 April 2003 the Applicant applied for a subclass 309 spouse visa with her husband acting as the nominator. That application was granted on 12 June 2003, and the Applicant came to Australia on 28 June 2003.
4. Some two years later the department of the First Respondent (“the department”) started to consider the grant of a permanent visa for the Applicant. The Applicant and her husband filed statutory declarations in support dated 23 April 2005 (CB 96-100 and 101-104) which were relevantly to the effect that the Applicant and the nominator lived together at an address in Eirene Street Yarraville, which was the home of the nominator's sister and her husband (the Applicant's brother).
5. On 26 September 2005 officers of the department conducted a home visit at the Eirene Street Yarraville address, and at the same time officers attended premises at Tenterden Street in Yarraville where the nominator's parents lived. The result of these visits (“the home visits”) was that officers of the department formed the view that the Applicant was living at the Eirene Street address and the nominator was living at the Tenterden Street address.
6. The parties were then interviewed on 4 October 2005 and as a result of the home visits and interview it became apparent that the Applicant and the nominator had been living apart since November 2004, at which time the nominator moved in with his parents. During the interview on 4 October 2005 the nominator stated that he had moved to his parent's house in November 2004 and the reason for doing so was his inability to support the Applicant on his youth allowance and his shame at relying on his sister and brother-in-law for financial support.
7. The parties told the interviewers on 4 October 2005 that they regarded the separation as temporary and that the reason that the Applicant did not move with her husband was because his parent's house was too crowded. Reference was also made to difficulties in studying on the part of the nominator in the Eirene Street address where young children were living.
8. In October 2005 the Applicant and the nominator commenced to live together again at an address in Hampton Parade West Footscray where they continue to live, and where they are on their own.

9. A delegate of the First Respondent refused the application for the permanent visa on 6 December 2005 because the delegate did not accept that the parties were in a genuine spousal relationship.
10. The Applicant engaged a migration agent and applied to the Tribunal for a review of the decision of the delegate and filed extensive materials in support of that application.
11. The Applicant, the nominator and his sister attended a hearing at the Tribunal on 23 June 2006 together with the migration agent. Following the hearing the Tribunal sent the Applicant a letter pursuant to s.359A of the *Migration Act 1958* ("the Act") inviting her to comment on certain information. The letter set out why the Tribunal considered the information relevant. The migration agent responded on 7 July 2006.
12. The Tribunal as earlier stated made its decision on 24 August 2006.
13. The file notes and records of the officers who conducted the home visit on 26 September 2005 together with the records of the interview on 4 October 2005 are set out in a supplementary court book. I accept that those materials were before the Tribunal. The Tribunal's decision (at CB 542-543) makes this clear.
14. That is the end of the facts as recited by the Applicant's and Respondent's contentions of fact and law.
15. The Applicant and the nominator had in August 2005 provided statutory declarations to the department, as earlier noted, describing their continuing spousal relationship and stating that they both supported each other.
16. Neither of the parties indicated that they had been living separately from each other since November 2004 and the nominator untruthfully gave his address as Eirene Street Yarraville. Statutory declarations were also provided in April 2005 from the nominator's sister and her husband, who also stated that the parties were both living at their home in Eirene Street Yarraville. Those statutory declarations describe the parties' contributions to the household (see CB 105-108).
17. The records kept by the officers of the department in the supplementary court book are summarised by the Tribunal (CB 543ff).

The conduct of the nominator and his family and indeed to a lesser extent that of the Applicant on the occasion of the home visits provide a formidable forensic difficulty for the Applicant, as counsel for the Applicant frankly and properly conceded.

18. Although a number of matters were raised as grounds of application in the application as originally filed, only three matters were pressed before the Court.
19. The first alleged error on the part of the Tribunal was said to be that the Tribunal improperly applied its own views of what a normal and genuine couple would do in respect of their finances. This had two sub-parts. It was submitted that the Tribunal had a set view that parties would not marry unless they had enough money to do so. The second sub-part was that the nominator would have made greater efforts to obtain employment between completing his studies in 2004 and 2006 when he obtained employment, if he was genuinely so ashamed of his financial situation that had caused them to live apart. It was suggested that the Tribunal allowed its own views impermissibly to affect the way it conducted the proceedings and arrived at its conclusions.
20. Counsel took me to passages in the transcript at pages 5, 6, 7, 8, 17, 18 and 19.
21. It should be noted that most of those transcript extracts refer to passages in which it might be felt that the Tribunal was indicating a state of mind that marriage would not normally be expected if the husband was unable to support the wife, rather than the second sub-part complained of that the husband should have made greater effort to obtain employment.
22. The second matter pressed on behalf of the Applicant by counsel was the alleged failure on the part of the Tribunal to pay proper consideration to reg.1.15A(3)(d)(1) and (2) and/or reg.1.15A(5) of the *Migration Regulations 1994* “(the Regulations”).
23. The Tribunal, it was submitted, accepted that the parties had lived together from June 2003 to November 2004 and from October 2005 to the date of the decision in August 2006. These periods in total amounted to about two and a half years. Accordingly, it was submitted

that this gave rise to consideration under both reg.1.15A(3)(d) and reg.1.15A(5) of the Regulations.

24. The latter provision has been described as akin to a statutory presumption in favour of a genuine spousal relationship (see *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 at [16] (“*Lee*”).
25. It was submitted that the Tribunal failed entirely to consider the effect and operation of reg.1.15A(5) and that this amounted to jurisdictional error.
26. The third ground pressed was an allegation that the Tribunal failed to consider the claim as at the time of decision. Counsel for the Applicant conceded that this was interrelated with the second matter raised. At the time of the decision the Applicant and the nominator were living under one roof on their own and it was put that the Tribunal simply failed to deal with this aspect of the case.
27. Counsel for the First Respondent submitted in respect of the first matter pressed by the Applicant that the Tribunal's observations about marriage and its interrelationship with finance arose solely from the fact that the Applicant together with the nominator had themselves raised this issue. She referred, correctly in my opinion, to the fact that the materials in the supplementary court book had already revealed to the Tribunal before the Tribunal hearing commenced that the nominator had already raised the question of the parties' finances as a reason why they had not lived together.
28. She went on to refer to the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [68]-[69] (“*Yusuf*”).
29. I accept counsel for the First Respondent's submission that the purport of that part of the decision in *Yusuf* supports the view that the Court is primarily concerned with what the Tribunal wrote in its decision rather than what it may have said in the running of the trial.
30. Further it was submitted that if a matter is not mentioned in the reasons for decision, the Court is properly able to infer that that matter was not considered to be material.

31. Counsel referred to the following extract from the judgment of Mansfield J in *Kamal v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 467 (“*Kamal*”) in the following terms at [21]:

“The decision as to whether the Tribunal has misdirected itself as a matter of law, or has misapplied the law, will almost invariably appear from its reasons for decision. It will be a rare case that the form of expression used in the course of a hearing could contribute in a meaningful way to consideration of such a claim.”

32. Counsel for the First Respondent submitted that the transcript extracts referred to by counsel for the Applicant received no mention in the Tribunal's decision as to financial issues.
33. She also submitted that the extracts of the transcript on page 7 at lines 25, 29 and 33 showed in fact that the Tribunal was doing no more than pursuing its inquisitorial function in relation to this aspect of the proceeding.
34. Counsel further submitted in the light of *Re Minister for Immigration and Multicultural Affairs; Ex Parte Cohen* [2001] HCA 10 at [36]-[37] that even if there was an error of fact, this would not give rise to jurisdictional error.
35. In respect of the second matter raised by the Applicant, counsel referred to passages of the judgment of the Tribunal at CB 547 in which it was submitted that the Tribunal had plainly referred to the terms of reg.1.15A(3) and (5) (albeit in paraphrased form) and in particular to the findings of the Tribunal at CB 550 that show that the Tribunal was seized of the time that the Applicant and the nominator spent living together (see first full paragraph – CB 550).
36. Counsel referred to *Lee* at [13] in which French J extracted a part of the judgment of Dowsett J in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 in which Dowsett J observed:

“that provision did not fetter the power of the Tribunal to determine the weight to be given to other evidence. Even in the absence of a provision such as subreg 1.15A(5), it would obviously be necessary to give great weight to the fact that the

parties had lived together for a substantial period of time prior to the application.”

37. Counsel submitted that the decision of the Tribunal at CB 549 showed that the Tribunal had accurately understood what the Applicant and the nominator said about the time they lived together. The Tribunal relevantly said:

“the Tribunal accepts that the parties have lived at the addresses described above during the relevant periods. For the reasons stated below, however, the Tribunal is not satisfied that the parties live together.”

38. That, taken in conjunction with the conclusions at CB 550, was said to dispose of this aspect of the matter. Counsel relied upon *Zhang v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) FCAFC 30 at [19] in support of the proposition that:

“The fact that the Tribunal has not, in terms, made express findings about each of the matters referred to in placita (i), (ii) and (iii) of subreg 1.15A(3)(c) does not demonstrate in the present circumstances that the Tribunal did not have regard to those matters.”

39. In respect of the final matter raised by the Applicant, namely, the failure to consider the Applicant's position at the time of decision, counsel referred to CB 547 where the Tribunal observed:

“There are no criteria to be satisfied at the time of application. Clause 100.221 requires that the visa Applicant continues to be the spouse of an Australian citizen...at the time of decision.”

40. It was submitted that the Tribunal had asked itself the right question and had assessed the matter at the time of decision, a matter shown by the extracts earlier referred to at CB 550.

41. In reply, counsel for the Applicant raised the possibility that he be allowed to amend his claim even at this late stage to include a claim of apprehended bias. This arose because of exchanges between counsel for the First Respondent and the Court in which the Court had expressed a preliminary view that the transcript extracts suggested that the Tribunal did indeed have a set view about finances in marriage,

namely, that parties would not ordinarily expect to be married unless the husband could support the wife.

42. I refused the application for leave to amend, both because the matter was raised so late and because in my view it was in substance already included in the Applicant's first ground. Even if I had not been of this view, the application was made too late for it to be appropriate to grant.
43. In respect of the first issue raised by the Applicant, namely the extracts from transcript and the attitude that they reveal of the mind of the Tribunal, I do accept that they very strongly suggest that the Tribunal did have an attitude to the effect that the husband ought to be able to support a wife at marriage. The extracts at page 5-7 of the transcript strongly suggest in my view that this was so.
44. Nonetheless, the extracts referred to on page 7 of the transcript at lines 20-35 do, as counsel for the First Respondent submits, show that at least in part the Tribunal's questions about the couple's finances, and in that instance the failure of the nominator to seek employment in some lesser capacity, were ones that would appear to have arisen properly in the ordinary exercise of the inquisitorial functions of the Tribunal.
45. Ultimately however, I accept on the authority of *Yusuf*, reinforced as it is by the extract from *Kamal* to which I have referred, the transcript is of little relevance in this case. Those aspects of the Tribunal's observation that in my view do show a rather old fashioned view about the obligations of a man to support his wife financially, play no part whatever in the Tribunal's reasons for decision. It is not possible to infer properly in my view that the Tribunal's reasoning was so infected by this attitude or this state of mind as to cause it to misunderstand its tasks or to properly apply itself to them. I accept that the failure of the Tribunal even to mention the incapacity of the nominator to support his wife financially on marriage in its reasons for decision is one that gives rise to an inference that the Tribunal in the ultimate paid no attention to this aspect of the matter.
46. Indeed, looking at the Tribunal's reasons as a whole and bearing in mind the caution expressed by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [271]-[272] as to not picking through the reasons for

the decision with an eye to finding error, it seems clear to me that the Tribunal did not allow the preconception that I think it had in this regard to affect its reasoning.

47. In respect of the second matter raised by the Applicant, I accept the submissions for the First Respondent. It is clear from the Tribunal extract at CB 547 that the Tribunal was well seized of its role. What the Tribunal said was:

“In forming an opinion whether a married or defacto relationship exists, the Tribunal must have regard to all the circumstances of the relationship, including in particular the considerations set out in regulation 1.15A(3). These considerations relate to the financial aspects, the nature of the household, the social aspects and the nature of the persons commitment to each other. The fact that two persons have lived together for a period of six months or more is to be taken as strong evidence of a genuine and continuing relationship.”

48. The Tribunal went on to deal with all of those matters individually. In considering why the parties lived separately for eleven months, the Tribunal observed that the nominator completed full-time study at the end of 2004 and did not commence any type of employment until July 2006. The Tribunal observed:

“the Tribunal might have expected that in a genuine relationship both parties would have made every effort to overcome the obstacles which were preventing them from living together as husband and wife.”

49. I do not think that that extract showed any improper bias or flawed reasoning on the Tribunal's part. Given that both the Applicant and the nominator had said that the reason for the nominator moving out of the household where the Applicant lived was the financial pressures the parties were under and his shame at not being able to provide for his wife, it was in my view a conclusion that it was well open to the Tribunal to draw.
50. I accept that the passage (at CB 550) referred to by counsel for the First Respondent shows that the Tribunal in substance was addressing precisely the issue it should have addressed including the

considerations that arise under reg.1.15A(3)(d) and 1.15A(5) of the Regulations.

51. In respect to the final matter advanced by the Applicant I entirely accept the submission of counsel for the First Respondent that the Tribunal asked itself the right question and addressed it at the time of decision.
52. This was a case before the Tribunal in which the Applicant and the nominator always faced a massive forensic burden. Their conduct in submitting false statutory declarations in April 2005 and their behaviour at the time of the home visits and interviews by officers of the department in September and October 2005 were matters always that they would struggle to explain.
53. This is not a matter of merits review. It is for the Applicant to show error of law on the part of the Tribunal. Error of law for these purposes is in my respectful view well summarised in an oft quoted passage from *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 where the Court states:

“16 It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57.”

54. In my opinion the Tribunal was well seized of the task before it and applied itself properly to that task.
55. While I have accepted that the transcript shows an element of predisposition on the part of the Tribunal towards a particular view of the obligations of a man to support his wife during marriage, I do not believe that the predisposition improperly affected the outcome of the proceeding.
56. To the contrary, there is no reason to think that the Tribunal's reasons do not in fact disclose the reasoning of the Tribunal in respect of all matters and in my opinion they do not disclose any error of law.
57. It follows therefore that the application must be dismissed.
58. As requested by counsel for the First Respondent the name of the First Respondent will be changed to 'Minister for Immigration and Citizenship'.

I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for judgment of Burchardt FM.

Associate: Brooke Evans

Date: 26 April 2007